COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00172-CV

ANDRE HUEY-YOU APPELLANT

V.

CLARETTE KIMP APPELLEE

FROM THE 352ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 352-283420-16

MEMORANDUM OPINION[1]

I. INTRODUCTION

This is an appeal from a no-answer default judgment entered in a suit to partition real property—a residence in Southlake (the Property)—owned jointly by Appellant Andre Huey-You and Appellee Clarette Kimp. The default judgment ordered the sale of the residence, appointed a receiver, and—based on Kimp's

[1]*See* Tex. R. App. P. 47.4.

pleadings and the evidence presented at the default-judgment hearing that Appellant had effected an ouster of Kimp from the residence and had dissipated monies owned by Kimp from a Charles Schwab account—awarded Kimp her share of the rental value of the Property and half of the amount of Appellant's unauthorized withdrawals from the parties' Charles Schwab account. In five points, Appellant argues that the trial court lacked jurisdiction to render the default judgment because, according to Appellant, only the divorce court possessed jurisdiction; that the trial court's awards are not supported by sufficient evidence; and that the trial court abused its discretion by equally dividing the sale proceeds and by denying his motion to vacate the default judgment. For the reasons set forth below, we will affirm.

II. Background

Prior to their marriage, Appellant and Kimp purchased the Property. Appellant and Kimp married and then later divorced in August 2014. The divorce decree confirmed an undivided 1/2 interest in the Property as the separate property of each party.

In January 2016, Kimp filed suit to partition the Property and for declaratory and injunctive relief. Kimp's request for declaratory relief alleged that she should be entitled to a disproportionate distribution, in her favor, from the proceeds of the sale of the Property because Appellant had effected an ouster of her from the Property and because Appellant had dissipated or had hidden funds.

After Appellant was served by substituted service and did not file an answer, Kimp filed a motion for entry of default judgment and an affidavit in support. At the default judgment hearing, the trial court heard testimony from Kimp and from a licensed real estate broker and then signed the default judgment. The default judgment states that the trial court found that it had subject-matter jurisdiction, that Appellant and Kimp owned the Property as tenants in common with each jointly owning a 50% interest in the Property, that the Property was not capable of division in kind, and that Kimp was entitled to an order of partition by sale. The default judgment also states:

> The Court further finds that Defendant has occupied the Property to the exclusion of the Plaintiff, effecting an ouster of the Plaintiff, who has had no use nor enjoyment of the property since August 12, 2014[,] and that the reasonable rental value of the Property from that date to present (20 months) has been $3,900 per month and that it would be fair and equitable for Plaintiff to be awarded her share of the rental value, which the Court finds and assesses at the sum of thirty-nine thousand ($39,000.00) dollars through this date, plus an additional $1,950 per month beginning May 1, 2016, for every month Defendant continues to occupy the Property, until it is sold; and
>
> The Court further finds that it would be fair and equitable for Plaintiff to receive $91,916.76 from Defendant's share of any net proceeds of sale of the Property, to compensate for the loss Plaintiff suffered as a result of Defendant's unauthorized withdrawals totaling $183,833.53 from the parties' Charles Schwab account ending in 8516, which was a fraud upon Plaintiff and a breach of fiduciary duty to not [] unfairly dispose of community assets.

Appellant filed a motion to vacate the default judgment, which the trial court denied. Appellant then perfected this appeal.

III. JURISDICTION

In his first point, Appellant argues that the trial court erred by rendering the default judgment because the court that entered the divorce decree—the 360th District Court of Tarrant County—had continuing, exclusive jurisdiction of the parties and the subject matter.

Whether a court has subject-matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Article V, section 8 of the Texas constitution provides that a district court's jurisdiction "consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." Tex. Const. art. V, § 8. Additionally, the legislature has provided that a district court possesses "the jurisdiction provided by Article V, Section 8, of the Texas Constitution" and "may hear and determine any cause that is cognizable by courts of law or equity." Tex. Gov't Code Ann. § 24.008 (West 2004). Accordingly, here, the trial court—the 352nd District Court of Tarrant County—has jurisdiction unless exclusive jurisdiction has been conferred on the 360th District Court of Tarrant County.

Appellant contends that Texas Family Code section 9.001(a) creates exclusive jurisdiction over this suit in the 360th District Court because that court rendered the parties' divorce decree. *See* Tex. Fam. Code Ann. § 9.001(a)

(West Supp. 2017). The language of Texas Family Code section 9.001(a), however, is permissive, not mandatory:

> A party affected by a decree of divorce or annulment providing for a division of property as provided by Chapter 7, including a division of property and any contractual provisions under the terms of an agreement incident to divorce or annulment under Section 7.006 that was approved by the court, *may* request enforcement of that decree by filing a suit to enforce as provided by this chapter in the court that rendered the decree.

Id. (emphasis added). Had the legislature intended for section 9.001 to provide continuing exclusive jurisdiction, it could have done so by using clear statutory language, as it has done in other sections of the family code. *See Chavez v. McNeely*, 287 S.W.3d 840, 844–45 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *see, e.g.*, Tex. Fam. Code Ann. § 9.101(a) (West 2006) ("[T]he court that rendered a final decree of divorce . . . retains continuing, exclusive jurisdiction to render an enforceable qualified domestic relations order . . ."); § 155.001(a) (West Supp. 2017) ("[A] court acquires continuing, exclusive jurisdiction over the matters provided for by this title in connection with a child on the rendition of a final order.").

Appellant also relies on *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 493 (Tex. 2015) (Green, J., dissenting), as support for his argument. The dissenting opinion in *Cantey Hanger*, however, specifically states:

> [T]he court of appeals'[s] holding[—]that the plaintiffs' fraud claims against Simenstad for "conspir[ing] with Cantey Hanger to falsify an airplane bill of sale . . . are not claims attempting to enforce the terms of the decree" and are therefore not within the continuing, exclusive jurisdiction of the divorce court, . . . [—]remains intact

> because it was not challenged on appeal. . . . Based on the Court's opinion today and the unchallenged portion of the court of appeals'[s] judgment, Simenstad's alleged conduct regarding the sale of the plane is separate from the divorce proceeding for purposes of the trial court's jurisdiction, but her attorneys' alleged conduct regarding the same transaction is a part of the divorce proceeding for purposes of attorney immunity.

467 S.W.3d at 493. Here, Kimp did not file suit alleging misconduct by Appellant's attorneys in the divorce proceeding. The *Cantey Hanger* opinion thus is inapplicable to Appellant's position that the 360th District Court had continuing, exclusive jurisdiction over the claims asserted by Kimp.

Because neither the family code nor case law mandates that the 360th District Court acquired continuing, exclusive jurisdiction over Kimp's claims in this suit, we hold that the trial court had subject-matter jurisdiction over Kimp's suit. We therefore overrule Appellant's first point.

IV. SUFFICIENCY CLAIMS

In his second and fourth points, Appellant challenges the legal sufficiency of the evidence to support the awards to Kimp for half the rental value of the Property and for half the amount of Appellant's unauthorized withdrawals from the parties' Charles Schwab account.

A. Standard of Review and Relevant Law on Affidavit Testimony

In a no-answer default judgment, the defendant's failure to answer operates as an admission of all the material facts alleged in the plaintiff's petition, except for unliquidated damages. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 930 (Tex. 2009); *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83

(Tex. 1992). When a specific attack is made on the legal sufficiency of the evidence to support the trial court's determination of unliquidated damages in a default judgment, the appellant is entitled to a review of the evidence produced. *See Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997); *Rogers v. Rogers*, 561 S.W.2d 172, 173–74 (Tex. 1978). When reviewing the legal sufficiency of the evidence, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). The factfinder is the only judge of witness credibility and the weight to be given to testimony. *Id.* at 819. When no findings of fact and conclusions of law are filed, we must presume the trial court made all the necessary findings to support its judgment. *Heine*, 835 S.W.2d at 83.

During a default-judgment proceeding, affidavit testimony will support the award of unliquidated damages if the affidavit avers personal knowledge of the facts, describes the circumstances that resulted in the loss, and identifies the total amount owed as a result. *See Tex. Commerce Bank, Nat'l Ass'n v. New*, 3 S.W.3d 515, 517 (Tex. 1999).

B. Award of Half the Rental Value

In his second point, Appellant, without citing any case law, challenges the sufficiency of the evidence to support the trial court's award to Kimp of half the rental value of the Property. Appellant argues that Kimp's testimony regarding rent consisted solely of hearsay and that the testimony of the licensed real estate

broker concerning the rental value of the Property reflected no personal knowledge of the relevant submarket and contained no assertion that she had ever sold or rented a property in the subdivision where the Property is located.

Here, even if Kimp's affidavit and her testimony regarding the rental value contained hearsay, unobjected-to hearsay constitutes probative evidence of unliquidated damages. *See id.* (holding that unobjected-to hearsay constitutes probative evidence in support of a default judgment and satisfies the requirement of evidence of unliquidated damages). Moreover, Appellant's complaint regarding the broker's qualifications was not preserved. *See Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 143–44 (Tex. 2004) (holding that an objection to an expert's qualifications must be preserved by objection or it is waived); *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 242 S.W.3d 67, 74 n.4 (Tex. App.—San Antonio 2007, pet. denied) (same). And finally, the broker testified that she is a licensed broker with her own company in Southlake and has been a relator in the area for fifteen years.

Having reviewed Kimp's affidavit and her testimony, as well as the real estate broker's testimony, and considering the evidence in the light most favorable to the trial court's award and indulging every reasonable inference that would support it, we hold that the trial court's award to Kimp of half the rental value of the Property for the twenty months that Appellant denied Kimp access to the Property is supported by legally sufficient evidence. We overrule Appellant's second point.

C. Award Equal to Half of Appellant's Unauthorized Withdrawals from the Charles Schwab Account

In his fourth point, Appellant, without citing any case law, challenges the sufficiency of the evidence to support the trial court's award of $91,916.76 to Kimp from Appellant's share of any net proceeds of the sale of the Property, which was awarded to compensate Kimp for the loss she suffered as a result of Appellant's unauthorized withdrawals from the parties' Charles Schwab account. Appellant argues that there is no credible evidence in the record from the default hearing to support this award because "Kimp's testimony at the default hearing offered no specific evidence, and no documentation, of any particulars identifying a specific retirement account, amounts that were in such account, or that were withdrawn or transferred and to whom or where such funds might have been transferred."

Appellant's argument, however, ignores that the trial court was entitled to rely on Kimp's affidavit. Her affidavit attests that she has personal knowledge of the facts stated therein and establishes that when she went to transfer her share of the IRA account, she discovered that Appellant had withdrawn $183,833.53 from their Charles Schwab account ending in 8516. We conclude that this evidence is legally sufficient to support the trial court's judgment awarding Kimp half the amount of Appellant's unauthorized withdrawals from the parties' Charles Schwab account ending in 8516. *See New*, 3 S.W.3d at 517 (holding affidavits

were legally sufficient to support trial court's damage award). We overrule Appellant's fourth point.

V. Equal Distribution of Proceeds from the Sale

In his third point, Appellant argues that the trial court abused its discretion by ordering that the proceeds from the sale of the Property be distributed equally, subject to the adjustment for Appellant's unauthorized withdrawals from the Charles Schwab account.[2] Appellant argues that he is entitled to a credit for the down payment and closing costs that were "wholly paid by him at closing." Appellant's argument is barred by res judicata because it is an attempt to relitigate the property division set forth in the divorce decree that confirmed Appellant and Kimp each owned an undivided 1/2 interest in the Property as their separate property. *See Baxter v. Ruddle*, 794 S.W.2d 761, 762–63 (Tex. 1990) ("Accordingly, an apportionment of retirement benefits in a divorce decree, even if improper, is not subject to collateral attack and will be enforced."); *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987) ("Thus, even though the contingent award was improper, the divorce decree, including the contingent penalty, is not

[2]Appellant's third point states, "The trial court erred in rendering judgment on May 5, 2016 for Appellee for partition of the real property at issue in this case and ordering distribution of equal proceeds." Because Appellant includes only a one-sentence argument regarding the propriety of the partition and cites no law to support his one-sentence argument, he has waived that argument. *See* Tex. R. App. P. 38.1(i) (requiring appellant's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284–85 (Tex. 1994) (recognizing long-standing rule that error may be waived through inadequate briefing).

subject to [appellee's] collateral attack. Res judicata also applies here to prevent relitigation of issues [that] should have been litigated in an earlier appeal."). Accordingly, we overrule Appellant's third point.

VI. MOTION TO VACATE DEFAULT JUDGMENT

In his fifth point, Appellant argues that the trial court abused its discretion by denying his motion to vacate the default judgment.[3] Appellant argues that he "had no intent to disregard a hearing that could have, and did, result in entry of the May 5, 2016 default judgment, because he did not receive notice of it in time, but after the judgment was entered." Because this was not a post-answer default judgment,[4] we broadly construe Appellant's argument in line with the statement in his declaration, which avers that he "did not become aware of the above-styled suit until after entry of the Default Judgment herein on May 5, 2016."

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[3]Appellant's fifth point states, "The trial court erred in denying Appellant's Motion to Vacate Default Judgment and refusing to consider evidence on Appellant's claims and defenses." Because Appellant did not brief his argument that the trial court refused to consider evidence on his claims and defenses, he has waived that argument. *See* Tex. R. App. P. 38.1(i); *Fredonia State Bank*, 881 S.W.2d at 284–85.

[4]*See generally Maxx Builders, LLC v. Story*, No. 01-15-00850-CV, 2016 WL 3544495, at *2 (Tex. App.—Houston [1st Dist.] June 28, 2016, no pet.) (mem. op.) ("Before entering a post-answer default judgment, the trial court must hold a hearing on the plaintiff's evidence, and the defendant must be given notice of the hearing."); *In re $475,001.16*, 96 S.W.3d 625, 627–28 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("[O]nce a defendant has made an appearance in a cause, he is entitled to the notice of the trial setting as a matter of due process under the Fourteenth Amendment.").

We review a trial court's decision to overrule a motion to set aside a default judgment and grant a new trial for abuse of discretion. *Lerma*, 288 S.W.3d at 926. A default judgment should be set aside and a new trial granted when the defaulting party establishes that (1) the failure to answer or to appear was not intentional, or the result of conscious indifference, but was due to a mistake or an accident; (2) the motion for a new trial sets up a meritorious defense; and (3) granting a new trial will not occasion delay or work other injury to the prevailing party. *Id.*; *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). When as here, no findings of fact and conclusions of law are filed, the denial of a motion to set aside the default judgment and for new trial must be upheld on any legal theory supported by the evidence. *See Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984).

In considering the first prong of the *Craddock* test—whether the failure to answer was not intentional, or the result of conscious indifference, but was due to a mistake or accident—we must look to the knowledge and acts of the defendant as shown by all the evidence contained in the record before the court. *Dir., State Emps. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 269 (Tex. 1994). When the nonmovant presents evidence at the hearing for new trial tending to show intentional or consciously indifferent conduct, it becomes a question for the trial court to determine. *Freeman v. Pevehouse*, 79 S.W.3d 637, 641 (Tex. App.—Waco 2002, no pet.). In acting as the factfinder, the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony.

Martinez v. Martinez, 157 S.W.3d 467, 470 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

Here, with regard to the first prong of the *Craddock* test, Appellant testified at the hearing on his motion to vacate the default judgment that he did not see the citation and pleading taped to his front door until after he received the judgment in the mail. Appellant admitted that his front door is visible from the street and that he maintains his front yard but said that he never looks at the front door when he mows his front yard[5] and that he always enters his house through his garage. Appellant further testified that when he gets his mail from the mailbox in the front yard, he first obtains his garage door opener from his car and then exits his garage to retrieve his mail. Appellant admitted that the process server had called him and said he had something to deliver, but Appellant testified that he was not told that the delivery consisted of court documents.

The process server testified at the motion for new trial hearing and contradicted Appellant's testimony. The process server testified that when he called Appellant, he identified himself as a Texas process server and told Appellant, "I have court documents for you[,] and I would like to get them in your hands." Appellant told the process server that he would not be available for three days but that he would call the process server and set a convenient time for the

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[5]Appellant thus claims that he did not look at his front door from March 9 (when the citation and pleading was served on Appellant by taping it to his front door) through sometime after May 5 (when the judgment arrived in the mail).

court documents to be served; Appellant never called the process server back and did not answer the process server's follow-up call. The record contains an affidavit of service from the process server reflecting that after unsuccessful attempts to personally serve Appellant, citation was executed on March 19, 2016, by affixing the citation and Kimp's pleading to the front door of the residence on the Property in accordance with the trial court's order allowing substituted service.

Based on the record, the trial court could have reasonably found that Appellant was properly served. *See El Paisano Nw. Hwy., Inc. v. Arzate*, No. 05-12-01457-CV, 2014 WL 1477701, at *3 (Tex. App.—Dallas Apr. 14, 2014, no pet.) (mem. op.) (holding that appellant was properly served through substituted service); *Thomas v. Bobby D. Assocs.*, No. 12-01-00361-CV, 2002 WL 1429821, at *2 (Tex. App.—Tyler June 28, 2002, pet. denied) (not designated for publication) (holding that trial court was free to disbelieve statement in appellant's affidavit that denied being served with citation because record contained return of service showing that appellant had been served). The trial court also could have reasonably found that Appellant's failure to answer before the default judgment was signed was the result of conscious indifference, thus failing to satisfy the first prong of the *Craddock* test. *See Thomas*, 2002 WL 1429821, at *2 ("[W]e conclude that there was evidence to permit the trial court to find that [appellant's] failure to answer before judgment was the result of conscious indifference on his part and was not due to a mistake or an accident."). Because Appellant failed to

satisfy the first prong of *Craddock*, we hold that the trial court did not abuse its discretion by denying Appellant's motion to vacate the default judgment. *See id.* We overrule Appellant's fifth point.

VII. Conclusion

Having overruled Appellant's five points, we affirm the trial court's default judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DELIVERED: January 11, 2018